

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROSCOE DEWAYNE WEST,

Defendant-Appellant.

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UNPUBLISHED

May 22, 2007

No. 269294

Oakland Circuit Court

LC No. 2005-205109-FC

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1),<sup>1</sup> and sentenced as an habitual offender, third offense, MCL 769.11, to 25 to 75 years' imprisonment. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

**I. Background Facts**

Defendant was convicted of sexually assaulting the 19-year-old victim, who is mildly mentally impaired, on February 2, 2004, at approximately 2:00 a.m. The victim testified that she met codefendant Victor Page at a mall and they exchanged telephone numbers. On the night of the incident, Page called the victim and invited her out to eat. The victim sneaked out of her parents' house and was picked up by Page, Page's brother Pierre Wallace, and Robert Wilson. After eating, the victim wanted to go home, but Page instead took her to Wilson's apartment in Pontiac. Once inside the apartment, Wallace allegedly coaxed the victim into the basement by indicating that he had something to show her. Defendant, whom the victim did not know, was in the basement. The victim, who is less than five-feet tall, indicated that defendant and Page began to remove her clothes against her will. Page and Wallace then held her down while defendant put his penis in her vagina and then in her anus. Defendant then held her down while Page put his penis in her vagina. When Page finished, defendant again penetrated the victim's

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<sup>1</sup> Defendant was charged with four counts of first-degree CSC. The jury acquitted defendant of two counts, but was unable to reach a decision on one count.

vagina. The victim testified that Wallace told her that he had a gun and threatened to kill her if she told anyone. The men then left the victim bleeding in the basement.<sup>2</sup>

The victim subsequently went upstairs. Wilson allowed her to use the phone, and Desiree Lopez picked her up. When Lopez arrived, the victim ran outside barefoot, and Lopez transported the victim to the victim's sister's house. Lopez testified that the victim was "hysterical," and directed Lopez to "hurry up and leave" because "they were coming back." The victim was eventually taken to a hospital. Medical personal testified that the victim was injured, bleeding from her hymen, and appeared anxious and distressed. The victim reported that two men penetrated her vagina and anus while other men held her down. The victim had an abrasion on her head, redness and tenderness on her inner labia majora, collarbone, and left knee, bruising on her thorax and hip, tears in her anal opening and hymen, and an abrasion on her cervix. A sexual nurse examiner opined that the victim had injuries that are not consistent with consensual sex. Medical personal contacted the police.

According to police testimony, although the victim initially lied about how she arrived at the apartment,<sup>3</sup> she consistently indicated that two men sexually assaulted her while she was being held down. The victim indicated that she initially lied because she was afraid the defendants would take retribution. The victim identified Page by name, and selected defendant from a lineup that contained 18 photographs. Deoxyribonucleic acid (DNA) testing of blood taken from the victim's cervix, external genital area, and underwear crotch revealed the presence of DNA that matched a DNA sample taken from defendant.<sup>4</sup> In a statement made to the police, defendant admitted having sex with the victim with Page present and seeing blood in the basement, but asserted that the sex was consensual.

Wilson testified for the prosecution. He indicated that after Wallace, Page, defendant, and the victim came to his apartment, defendant and the victim went in the basement. He did not hear any noise or protesting. Later, defendant, Page, and Wallace left to go to the store, while the victim went in an upstairs bathroom. Wilson explained that when the victim came out of the bathroom, she was upset and started crying when she realized that she did not have a ride home. The victim told Wilson that one of the men had sex with her and asked for assistance. Wilson advised the victim that he expected the men's return.

Wallace testified for the defense. Wallace claimed that he and defendant went to Wilson's apartment to pick up Page. Page was on the couch with the victim but when defendant walked into the house, the victim stopped talking to Page and started talking to defendant. The victim was flirtatious and led defendant into the basement. Wallace denied touching or threatening the victim.

## II. Leading Questions

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<sup>2</sup> Photographs of bloodstains in the basement were admitted into evidence.

<sup>3</sup> The victim initially told the police that her boyfriend had driven her to the apartment where two men raped her.

<sup>4</sup> Based on the testing, Page was excluded as a contributor.

Defendant first argues that the prosecutor's use of leading questions during the examination of the victim denied him his right to a fair trial. We disagree. We review a trial court's decision to allow leading questions for an abuse of discretion. *People v Fields*, 49 Mich App 652, 658; 212 NW2d 612 (1973); MCL 768.24.<sup>5</sup>

MRE 611(c)(1) states that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." For example, this Court has held that "a considerable amount of leeway may be given to a prosecutor to ask leading questions of child witnesses." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), lv den 465 Mich 933 (2001) (citation omitted). To warrant reversal based on a prosecutor's use of leading questions, the defendant must show "some prejudice or patterns of eliciting inadmissible testimony." *Id.* Reversal is not required if the defendant was not prejudiced by the leading questions. *Id.*

On this record, the trial court did not abuse its discretion in permitting the prosecutor to use leading questions during the examination of the victim. Although the victim's biological age was 21 years old at the time of trial, the record showed that she had the mental capacity of a nine-year-old child. A Pontiac school psychologist testified that, according to the victim's 2000 psychological evaluation, she "is functioning in the lower realm of the mildly impaired, mildly developmentally disabled, mildly to moderately impaired range of retardation." The victim is one point from a "moderately retarded" classification. The psychologist explained that a person with an average intelligence has an IQ score of between 90 and 109, but the victim's overall IQ score is 56. The psychologist testified that the victim is functioning as a nine-year-old child, that "both her expressive and receptive language skills are very depressed," and she has "mental confusion" in understanding questions. Considering this evidence, the trial court aptly noted, "Given the mental capacity of the victim and the events that happened to her, leading questions were necessary to develop her testimony."

We note that in this case, the questions were leading to a degree that gives us pause, and we would caution prosecutors against using leading questions to elicit so many details and to build so many elements of the case. However, we also note that, in answer to a question that was in no way leading, the witness stated that she was raped. The witness did provide relevant details in answer to other non-leading questions by the prosecutor. In addition, given the wealth of other evidence offered by the prosecutor, including DNA evidence, we cannot say that the prosecutor's method of questioning this witness rises to the level of reversible error. Although the questions the prosecutor asked of this witness were clearly leading, defendant has failed to show either that they elicited inadmissible testimony or that he was prejudiced by the leading questions.

We reject defendant's related argument that he was denied the effective assistance of counsel because defense counsel failed to object to the prosecutor's use of leading questions. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving

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<sup>5</sup> While defense counsel did not object, the issue was preserved by codefendant Page's attorney's objection. See *People v Brown*, 38 Mich App 69, 75; 195 NW2d 806 (1972).

otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Although defense counsel did not object, codefendant Page's counsel objected and the trial court addressed the issue. In addition, because we find the trial court did not abuse its discretion in permitting the use of leading questions to examine the mentally impaired victim, defendant cannot demonstrate that the result of the proceeding would have been different had defense counsel objected. *Effinger, supra*. Defendant is not entitled to a new trial.

### III. Right of Confrontation

Defendant further argues that he was denied his right of confrontation by the victim's intransigence and lack of memory during cross-examination. We review de novo constitutional questions regarding a defendant's right of confrontation. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000), lv den 462 Mich 906 (2000). A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Watson, supra* at 572.

A defendant's constitutional right to confront his accusers is secured by the right to cross-examination guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). "The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *Watson, supra* at 584 (citation omitted). However, "the defendant has no constitutional right to a successful cross-examination." *Id.* "[A] defendant's right of confrontation is not denied even if the witness, on cross-examination, claims a lack of memory." *Id.*

Defendant was able to confront the victim. The victim testified under oath and was subjected to cross-examination, and the jury had the opportunity to observe her demeanor.<sup>6</sup> Although the victim refused to answer certain questions and claimed memory problems, defense counsel used her lack of recall and unresponsiveness to contest the credibility of her testimony.<sup>7</sup>

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<sup>6</sup> When denying defendant's motion to dismiss on this basis, the trial court noted the victim's mild to moderate mental disability, and that counsel "is not helping the matter by repeating the same questions after the court sustained an objection to the question," which could "be very confusing to the victim." The court also noted that counsel's "tone of voice was very confrontational," which "was not helping matters."

<sup>7</sup> Defense counsel argued:

And, when asked about details, that's when she becomes defiant. That's when she starts to shut down. That's when she gets an opportunity to run off that stand and run out of this Courtroom and said, I'm not answering anymore questions. I'm done.

(continued...)

In addition, the trial court instructed the jury that in evaluating witnesses' credibility, it should evaluate whether the witness seemed to have a good memory, and whether the witness seemed to be evading questions and arguing with the lawyers. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), lv den 471 Mich 916 (2004). Defendant was not denied his right of confrontation.

#### IV. Prosecutorial Misconduct

Defendant also argues that he is entitled to a new trial because the prosecutor impermissibly vouched for Robert Wilson when she remarked, "That guy's telling the truth . . . [the victim] knew they were coming back." We disagree. Although the prosecutor's comment appears inappropriate, in the context of the prosecutor's rebuttal argument, it is not reversible error.

Because defendant failed to object to the prosecutor's remark, we review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), lv den 463 Mich 928 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A prosecutor may not vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001), lv den 465 Mich 934 (2001). Here, viewed in context, the challenged remark did not suggest that the prosecutor had special knowledge that Wilson was credible. Through a partial and selective recitation of the record, defendant has mischaracterized the prosecutor's argument. In rebuttal argument, the prosecutor stated the challenged remark in the following context:

Defiant manipulation. Is that what you saw? Somebody can control a situation. [The victim] couldn't even control herself for God sakes. Let alone a

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(...continued)

Because you start getting into the details. And, see you start getting [sic] challenging her about details of this case, about the different stories that she told, that's when she doesn't want to answer. That's when she shuts down. See, that's the mark of a person not telling the truth. It's not about a truthful person. Particularly in a situation where she's in and he's manipulated the situation from day one. And, when she finally – and every single time that she's challenged about the details about what she said, she shuts down. She doesn't answer. I don't remember. I don't remember saying that. No, I don't remember saying that. All I know is these two men raped me.

situation. The doctor testified she doesn't have the mental ability to do that. So, I'm really not sure who [defense counsel] thought he was seeing.

She was upset because they didn't take her home. Once again, please do believe that Robert Smith [sic]. Because I asked that man three times, what did you tell her? They're coming right back. Now if she was so worried about getting a ride, she knew they were coming back, why not just hang out there and wait for them? You remember that? Three times we asked him that.

This wasn't because they didn't give her a ride home. *That guy's telling the truth, then she knew they were coming back. I have no doubt that they're coming right back.* That's why this kid, I want to get out of here now. Terrified, as [Wilson] described her. Doesn't know her. She's terrified. (emphasis added).

The prosecutor's argument was focused on refuting defense counsel's assertions during closing argument that the victim was not credible, that her testimony was inconsistent with Wilson's testimony, and that the victim contrived the story because she had lied to her parents and was upset that the men would not give her a ride home. In making the challenged remark, the prosecutor discussed the evidence, and argued that there were reasons to conclude that the victim was credible. Indeed, a prosecutor is free to argue from the facts that a witness is credible. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996), lv den 456 Mich 874 (1997); *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996), lv den 454 Mich 883 (1997). Further, the prosecutor's comment must be considered in light of defense counsel's comments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997), lv den 456 Mich 955 (1998). Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Additionally, in its final instructions, the trial court instructed the jurors that they were the sole judges of the witnesses' credibility, and that the lawyers' comments are not evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001), lv den 465 Mich 952 (2002). Consequently, this claim does not warrant reversal.

We reject defendant's related argument that he was denied the effective assistance of counsel because defense counsel failed to object to the prosecutor's remark. Because the trial court's instructions adequately protected defendant's rights, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Effinger, supra*.

## V. Due Process

Defendant lastly argues that he was denied his right of due process when the trial court precluded him from questioning a police detective about the investigation of Pierre Wallace. We disagree. "A trial court's limitation of cross-examination is reviewed for an abuse of discretion." *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002), lv den 467 Mich 949 (2003).

A witness may be cross-examined on any matter relevant to any issue in the case, *People v Federico*, 146 Mich App 776, 793; 381 NW2d 819 (1985), lv den 425 Mich 867 (1986), but neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant

evidence or cross-examine on any subject. *Adamski, supra*. Rather, a court has wide latitude to impose reasonable limits on cross-examination based on concerns such as prejudice, confusion of the issues, or questioning that is irrelevant or only marginally relevant. *Id.*; *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401.

Here, we find no abuse of discretion. During trial, defendant requested to question the detective about whether Wallace was investigated and charged. Defendant claims on appeal that he sought to demonstrate that the police somehow failed to properly investigate this case and charged the incorrect parties. Contrary to defendant's implication, testimony was presented at trial that the police interviewed Wallace in connection with this case. Furthermore, "the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998); *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). Defendant has not demonstrated, or even argued, that the prosecutor abused its charging discretion in this case. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996) (a prosecutor abuses his discretion only if "a choice is made for reasons that are 'unconstitutional, illegal, or ultra vires.'").

Also, we agree with the trial court that, under the circumstances of this case, the proffered evidence was not relevant. Evidence concerning the details of the police investigation of Wallace did not have a tendency to make it more likely that defendant was not guilty. Although the victim's story was inconsistent in some respects, she did not waver on her identification of defendant and codefendant Page as the two men who sexually penetrated her. Defendant admitted having sexual intercourse with the victim, and his DNA was found outside the victim's genital area, in her cervix, and in the crotch of her underwear. Medical testimony revealed that the victim's injuries were not consistent with consensual sex, and the victim's blood was found in Wilson's basement. In short, defendant has failed to demonstrate how delving further into the police investigation of Wallace would disprove his own culpability. MRE 401. As such, the inference defendant is trying to draw between the particulars of the police investigation of Wallace and his own culpability is tenuous and may have confused the issues. MRE 403. Consequently, reversal is not warranted on this basis.

Affirmed.

/s/ Jessica R. Cooper  
/s/ William B. Murphy  
/s/ Janet T. Neff